

1                   BEFORE THE BOARD OF PERSONNEL APPEALS  
2   IN THE MATTER OF THE UNFAIR LABOR PRACTICE  
3   CHARGE #13, 1976

ULP-13-1976

4   ROCKY BOY EDUCATION ASSOCIATION, an  
5   affiliate of MONTANA EDUCATION ASSOCIATION,

FINAL ORDER

6                   Complainant,

7                   vs.

8   ROCKY BOY SCHOOL DISTRICT NO. 87,

9                   Defendant.

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10           A proposed Findings of Fact, Conclusions of Law and Order  
11   was issued by Hearing Examiner, Mr. Jerry L. Painter on December  
12   14, 1976 finding that teacher evaluation is a mandatory subject  
13   of bargaining and ordered the Board to negotiate that subject  
14   with petitioner. Exceptions to that Order were filed by the  
15   Rocky Boy School District No. 87. and oral argument was heard by  
16   the Board of Personnel Appeals on March 1, 1977. After reviewing  
17   the record and considering the briefs and oral arguments, the  
18   Board makes the following Order:

19           1. IT IS ORDERED, that the Exceptions to the Hearing Examiner's  
20   Proposed Findings of Fact, Conclusions of Law and Proposed Order  
21   are denied.

22           IT IS ORDERED, that this Board adopts the Findings of Fact,  
23   Conclusions of Law and Order issued by the Hearings Examiner.

24           Dated this 17th day of June, 1977.

25                   BOARD OF PERSONNEL APPEALS

26                   By Brent Cronley  
27                   Brent Cronley  
28                   Chairman  
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BEFORE THE BOARD OF PERSONNEL APPEALS

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IN THE MATTER OF UNFAIR LABOR PRACTICE #13-76

ROCKY BOY EDUCATION ASSOCIATION  
an affiliate of MONTANA EDUCATION  
ASSOCIATION,

ULP-13-1976

Complainant,

-vs-

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDED ORDER.

ROCKY BOY SCHOOL DISTRICT NO. 87,

Defendant.

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Complainants have charged Defendant with several unfair labor practices. It has charged that Defendant has interfered with the administration of a labor organization, has discriminated in regard to tenure of employment to discourage membership in a labor organization, and has refused to bargain collectively in good faith with Complainant. The matter concerning the reinstatement of Richard Letang was addressed in a Proposed Findings of Fact, Conclusion of Law, and Recommended Order issued by this hearing examiner, November 5, 1976. This decision shall deal with the charges of interfering with the administration of a labor organization, and the refusal to bargain collectively in good faith. Since the issues concerning what are and what are not mandatory subjects of bargaining were submitted on briefs, I will deal with that matter separately in this decision.

Before I begin writing the formal decision, however, I must address the issue that was all pervasive throughout the hearing and an issue which Complainant dedicated a large portion of its brief to: Indian education and the preservation of their cultural integrity. The question and the problem has been of much concern to this hearing examiner. Can collective bargaining and Indian Control of Indian education be reconciled? One only has to visit the Rocky Boy School District to be impressed with the efforts of

1 the School District in instilling Indian cultural heritage in the  
2 school children at the school. It is a task and an effort deserv-  
3 ing high praise and support.

4 On the other side of the coin is the right to collective  
5 bargaining given to every public employee, regardless of whether or  
6 not the state employee is employed on an Indian Reservation. This  
7 Board was established to administer the Montana Public Employee  
8 Collective Bargaining Act. This Board is a strong supporter of  
9 collective bargaining in the public sector. If allowed to work  
10 properly it can provide stable relationships between public  
11 employers and their employees. Ultimately, the stable relation-  
12 ship can provide better service to the consumer, who in this case  
13 are the students attending Rocky Boy School.

14 I do not believe that collective bargaining by the teachers  
15 in the Rocky Boy District is a threat to the school district's  
16 goal of preserving the cultural integrity of the students attending  
17 the school. If used properly, collective bargaining can be an  
18 asset. The teachers must be made members of the team in pursuit  
19 of the school district's goal. There must be an atmosphere of  
20 professionalism for the teachers to function and make their contri-  
21 bution to the school's goals. Finally and most importantly, if  
22 the teachers are not treated as professionals by the school admini-  
23 stration, to create good feelings between the two groups, then  
24 both the students and the ultimate goals of the school district  
25 will suffer. Although I will address this issue throughout my  
26 decision, I must at this time conclude that good faith bargaining  
27 by the school administration and the teachers is in no way a  
28 threat to the School District's goal of preserving the cultural  
29 integrity of the Indian students.

30 The first portion of this decision shall deal with the issue  
31 of whether or not Defendant is guilty of interfering with the  
32 administration of a labor organization, and guilty of refusing to

1 bargain collectively in good faith. After reviewing the evidence,  
2 the testimony and the briefs submitted by both parties, the follow-  
3 ing are my findings of fact:

#### 4 FINDINGS OF FACTS

5 1. The Rocky Boy Education Association is the employer-  
6 recognized bargaining agent for "all personnel certificated in  
7 Class 1, 2, 4, or 5 as provided in Section 74-6006, R.C.M. 1947,  
8 and principals certificated in Class 3, if they elect to be  
9 included, whether under contract or on leave." (SEE: Joint  
10 Exhibit A)

11 2. The Rocky Boy Association served formal notice upon the  
12 School District that it wished to enter into formal negotiation  
13 sessions. (SEE: Petitioner's Exhibit 9A)

14 3. Dorothy Small sent the letter back requesting that  
15 corrections of the typing errors be made. (SEE: Petitioner's  
16 Exhibit 9B)

17 4. From January 19, 1976, to June 16, 1976, the two parties  
18 met approximately 20 times for a total of approximately 86 hours.  
19 (SEE: Defendant's Exhibit 10. The exhibit was not contradicted  
20 by any testimony.)

21 5. Petitioner's Exhibit 1 through 5, letters from the School  
22 District cancelling scheduled negotiation sessions, show that the  
23 school district cancelled 5 bargaining sessions. Testimony of  
24 Richard Letang on cross-examination shows that the RBEA negotiation  
25 team members agreed to the cancellation of four of the meetings.  
26 One of the cancellations was not agreed to: the memo dated February  
27 17, 1976, cancelling negotiations until further notice because  
28 Harold and Gerald Gray would be out of town. Gerald Gray, however,  
29 denied that the Association did not agree to the cancellation. The  
30 next negotiation session took place on February 25, 1976, after the  
31 February 17th cancellation.

32 6. Petitioner's Exhibit 7 shows that a letter hand delivered

1 by Harold Gray, was presented to Mr. Letang demanding inspection  
2 of the local MEA's minutes. The letter was signed by Dorothy  
3 Small, Gerald Gray, and Harold Gray. The letter asserted that  
4 Article II, Section C of the 1975-1976 agreement required compliance  
5 with the demand. (SEE: Petitioner's Exhibit 7)

6 7. Article II Section C reads:

7 "In so far as it is the legal requirement of the Board  
8 to permit inspection of minutes, financial information,  
9 or other lawful information to taxpayers and other inter-  
10 ested community members, the Association hereby agrees to  
11 grant the same courtesy to the Board." (SEE: Joint Exhibit A)

12 8. On March 10, 1976, a letter was handed to Mr. Letang by  
13 Harold Gray and signed by Dorothy Small which questioned the  
14 legality of the local Rocky Bay MEA Unit to act as the collective  
15 bargaining representation for the local school teachers.

16 The letter further questioned when the RBEA's constitution and  
17 bylaws were passed. It stated:

18 "If you refuse to provide us with the official minutes of  
19 the association's meeting documenting the official input  
20 by teachers and adoption of the association's constitution  
21 and bylaws, then we will consider that you are not willing  
22 to negotiate in 'good faith' and that your organization  
23 is attempting to conceal it's dishonesty.

24 "So that there is no misunderstanding among all concerned  
25 we are sending a copy of this letter displaying our con-  
26 cern to all of your membership, the board members, school  
27 administrators, and it's negotiation representatives."

28 9. The School District circulated questionnaires to the  
29 teachers of the school district with the following 5 questions:

- 30 "1. Do you have a copy of the local M.E.A. Association's  
31 Constitution and by-laws? Yes \_\_\_\_\_ No \_\_\_\_\_  
32 2. Have you ever been given a copy?  
3. Have you ever been involved in writing up the association's  
constitution and by-laws? When?

- 1 4. Have you ever voted to adopt the association's  
2 constitution and by-laws?  
3 5. Have you ever gone over the local M.E.A. Association's  
4 constitution and by-laws in a meeting? When?"

5 (SEE: Petitioner's Exhibit 15)

6 10. During a March negotiation session, Sean Mathews, an  
7 MEA staff representative, testified that Gerald Gray demanded proof  
8 that the Association continued to represent the teachers. There  
9 was no testimony to refute the testimony.

10 11. A letter from Tom Swisher, a teacher of the school  
11 district was entered into evidence by Defendant School District.  
12 The letter was addressed to "Dick Letang, President MEA Rocky  
13 Boy School". The letter states the dissatisfaction Mr. Swisher  
14 had with the representation of MEA. Mr. Swisher alleges he was  
15 misrepresented by MEA in negotiations in a couple of ways. One  
16 way was the failure to negotiate housing and utilities, the other  
17 was the failure to inform Mr. Swisher of the progress in negotia-  
18 tions. (SEE: Defendant Exhibit 7) The Board suggested that the  
19 letter created sufficient doubt as to the representation of RBEA  
20 of the teaching staff of Rocky Boy School District.

21 12. Testimony has established that the school board has failed  
22 to provide tape recordings of the negotiation sessions when  
23 requested by RBEA which is contrary to their agreement with RBEA.

#### 24 DISCUSSION

25 Considering the above findings of fact this Board is quite  
26 alarmed at what has transpired during negotiations. The sending  
27 back of Mr. Letang's letter with the note attached to correct the  
28 errors is a rude act and an act which shows little respect for the  
29 professional relationship between the two groups involved in the  
30 negotiations. It also set the entire collective bargaining process  
31 off on the wrong foot. It would be similar to starting off a  
32 marriage by slapping your spouse in the face. One could expect  
little from such a marriage, and certainly, one can expect little

1 from collective bargaining which started out on the wrong foot.

2 But the proceedings went from bad to worse. Although this  
3 Board cannot fault the School Board for requesting minutes that  
4 were agreed in the contract would be exchanged, the other demands  
5 made by the School Board shows a lack of trust and respect for  
6 RBEA. Requiring a report on the NEA convention, demanding bylaws,  
7 refusing to give tape recording which partly belonged to RBEA,  
8 and demanding proof of support at the bargaining table when no  
9 good faith showing of doubt of majority representation existed  
10 all of this is proof to this Board of harassment of RBEA by the  
11 School District. There was insufficient evidence presented at  
12 the hearing to establish that any of this was done in good faith.  
13 One letter from a disgruntled RBEA member is insufficient to  
14 produce a good faith doubt of RBEA's support. There is always  
15 one or two disgruntled union members. If this Board were to  
16 condone such conduct with such flimsy showing of good faith, we  
17 would be encouraging the constant harassment of bargaining repre-  
18 sentatives throughout the state.

19 The School District argued that it had a right to see the by-  
20 laws and to question the establishment of the bylaws. I do not  
21 agree. The bylaws are the concern of the persons joining the  
22 union, and become the concern of this Board when we are petitioned  
23 to certify that union as a bargaining representative. (SER: §9-  
24 1603(4)) They are not the concern of the employer. They are the  
25 internal affairs of the union which management must keep its nose  
26 out of.

27 The School District points out that over 80 hours of bargaining  
28 has transpired between the two parties. If those hours are spent  
29 in harassment and bickering between the two parties, it can hardly  
30 be labeled good faith collective bargaining.

31 The legislature in establishing the Montana Public Employees  
32 Collective Bargaining Act stated that the reason for establishing

1 the act was "to promote public business by removing certain recog-  
2 nized sources of strife and unrest...." In the fact situation  
3 before me now, the only thing that has been accomplished is the  
4 promotion of strife and unrest.

5 I fail to find that the cancellations of the negotiation  
6 sessions by the School District were a part of this harassment by  
7 the School District. All but one of the cancellations were agreed  
8 to by RBEA. All cancellations seem to have legitimate reasons.  
9 This does not, however, give the School District a carte blanche  
10 right to cancel negotiation sessions. Section 59-1605(3) requires  
11 parties to meet at reasonable times. Such requirement would negate  
12 the right to a unilateral cancellation of negotiation session  
13 without substantial good reason.

#### 14 SECOND ISSUE

15 The next issue I have been asked to rule on is the scope of  
16 bargaining between the two parties. The School Board has refused  
17 to bargain on certain subjects which RBEA have made requested to  
18 be bargained. There are six topics:

- 19 1. Just Cause for dismissal of all teachers.
- 20 2. Teacher Evaluation.
- 21 3. Teacher working hours.
- 22 4. Maintenance of standards clause.
- 23 5. Housing and utilities clause.
- 24 6. Job description of non-classroom certified personnel.

25 Except for Housing and Utilities clause, the subjects were  
26 submitted as questions of law and were dealt with by brief submitted  
27 by counsel for both sides.

28 Upon reviewing the question of maintenance of Standards Clause,  
29 I am not convinced that the School Board has refused to negotiate  
30 on the subject but rather have refused to concede to the demands  
31 of RBEA. I obtain this impression from petitioner's exhibit 6.  
32 I therefore will not rule on whether or not a maintenance of standards  
clause is a negotiable subject.



1 As to the question of job descriptions for non-classroom  
2 certified personnel, the question is not merely a legal question  
3 but is also an evidentiary question. I cannot rule on the matter  
4 on the limited knowledge of the matter I have before me. Upon  
5 motions of either counsel I will reopen the matter to take the  
6 necessary evidence, or in the alternative have a stipulation of  
7 fact presented to me which would allow me to rule on the matter.

8 As to just cause for dismissal of all teachers, again from  
9 petitioner's exhibit #6 I am convinced that the School Board has  
10 done nothing more than refused to concede to the demands of ABEA.  
11 I do not interpret petitioner's exhibit #6 as declaring the matter  
12 nonnegotiable. I will, therefore, not rule on that matter either.

13 The three matters left for my determination of whether or not  
14 the subject is a mandatory subject of bargaining are teacher  
15 evaluation, teacher working hours, and housing and utilities clause.

16 Because of the testimony offered concerning the housing and  
17 utilities, the following is my findings of fact:

18 13. Tim Sullivan, a teacher in the School District last year  
19 testified that when he interviewed with the School District he  
20 was informed that the teachers were required to live in the school  
21 housing. Later, it was qualified that some teachers live in Havre  
22 but the School District preferred teachers to live in the school  
23 district housing.

24 Mr. Gerald Gray denied that there was any requirement or  
25 pressure for teachers to live in school district housing.

26 It is my finding that there is no formal policy of the School  
27 District requiring teachers to live in school district housing.  
28 Nor did I find there to be any pressuring of the teachers to live  
29 in school district housing. Although Mr. Sullivan may have felt  
30 pressured into living in the school district housing, I am not  
31 convinced that it was not just Mr. Sullivan's own interpretation  
32 of what was said to him as opposed to being the school district's

1 official (or unofficial) position.

2 14. Testimony further established that the approximate cost  
3 for a 3 bedroom home in the school district housing cost  
4 approximately \$125 per month. This testimony was uncontroverted.  
5 Defendant's Exhibit #13 (also uncontroverted) showed that the  
6 average cost to rent a 3 bedroom home of similar quality as those  
7 in the school district housing is between \$300 and \$325.

8 The problem of determining what is and what is not a mandatory  
9 subject of bargaining has been presented to this Board before and  
10 is slowly becoming a reoccurring problem. This Board has never  
11 attempted to establish a list of rules to be used to make a  
12 determination of whether a matter is mandatory subject of bargaining  
13 as a panacea to this problem. It has chosen rather to take each  
14 problem case-by-case.

15 There is a definite trend, however, toward adoption of a  
16 balancing approach in determining what is and what is not a  
17 mandatory topic of collective bargaining. The approach has been  
18 taken because of the nature of collective bargaining in the public  
19 sector. Public employees have the right under Section 59-1603(1)  
20 to:

21 "the right of self-organization, to form, join or assist  
22 any labor organization, to bargain collectively through  
23 representatives of their own choosing on questions of  
24 wages, hours, fringe benefits, and other conditions of  
25 employments and to engage in concerted activities for  
26 the purpose of collective bargaining or other mutual  
27 aid or protection, free from interference, restraint  
28 or coercion."

29 Under subsection (2) of the same section are enumerated management  
30 prerogatives. "Other conditions of employment" and the management  
31 prerogatives enumerated under subsection (2) are both so general that  
32 interpretation by this Board becomes mandatory. In its interpreta-  
tion this Board must keep paramount the policy of the act, 59-1601:

"Policy. In order to promote public business by

1 removing certain recognized sources of strife and  
2 unrest, it is the policy of the State of Montana to  
3 encourage the practice and procedure of collective  
4 bargaining to arrive at friendly adjustment of all  
5 disputes between public employers and employees".

6 In order for this Board to promote public business by removing  
7 certain recognized sources of strife and unrest, we must balance  
8 how a matter affects the well being of an individual teacher  
9 with the right of a public official to properly manage the affairs  
10 of the public body he administers.

11 The interpretation of subsections (1) and (2) of Section 59-  
12 1603 requires a striking of a balance where those matters relating  
13 directly to "wages, hours, fringe benefits, and other conditions  
14 of employment" are made mandatory subjects of bargaining and  
15 reserving to management those areas that the public sector neces-  
16 sarily requires to be managerial functions. In striking this  
17 balance the paramount concern must be the public interest in  
18 providing for the effective and efficient performance of the  
19 public service in question.

20 The Supreme Court of Kansas was recently required to consider  
21 this problem. National Education Ass'n. of Shawnee Mission, Inc.  
22 v. Board of Education of Shawnee Mission Unified School District  
23 No. 512, 212 Kan 741, 512 P.2d 426 (1973). In that decision the  
24 Court was confronted with a dispute between a teachers' association  
25 and the board of education. In resolving questions relating to  
26 the scope of negotiations provided under their statute they  
27 recognized that "terms and condition" which were negotiable under  
28 the terms of the statute as something more than minimal economic  
29 terms of wages and hours, but something less than the basic  
30 educational policies of the board of education. That Court  
31 suggested that the courts of that jurisdiction should resolve  
32 these issues on a case-by-case basis. The Kansas court suggested;

1 "The key, as we see it, is how direct the impact  
2 of an issue is on the well being of the individual  
3 teacher, as opposed to its effect on the operation  
4 of the school system as a whole." Id. §12 P.2d 435.

5 This hearing examiner believes that the suggested test  
6 is helpful in attempting to strike the balance between subsection  
7 (1) and (2) of Section 59-1003 of our statute.

8 The Pennsylvania Supreme Court agreed with the Kansas Supreme  
9 Court and in Pennsylvania Labor Relations Board v. State College  
10 Area School District 337 A.2d 262, 90 LRRM 2001 (1975) the court  
11 stated that its test shall be:

12 "Thus we hold that where an item of dispute is a  
13 matter of fundamental concern to the employees' in-  
14 terest in wages, hours and other terms and conditions  
15 of employment, it is not removed as a matter subject to  
16 good faith bargaining under section 701 simply because  
17 it may touch upon basic policy. It is the duty of the  
18 Board in the first instance and the courts thereafter  
19 to determine whether the impact of the issue on the  
20 interest of the employee in wages, hours and terms and  
21 conditions of employment outweighs its probable effect  
22 on the basic policy of the system as a whole. If it  
23 is determined that the matter is one of inherent  
24 managerial policy but does affect wages, hours and  
25 terms and conditions of employment, the public employer  
26 shall be required to meet and discuss such subjects  
27 upon request by the public employee's representative  
28 pursuant to section 702."

29 The Oregon Court of Appeals also adopted the balancing  
30 approach. SEE: Sutherland Education Ass'n. v. Sutherland School  
31 District No. 130, 548 P.2d 264 and Springfield Education Ass'n.  
32 v. Springfield School District No. 19, 549 P.2d 1141. In

1 Sutherlin the Oregon Court stated:

2 "Rather, the appropriate test to be applied in  
3 determining whether a proposed subject is a 'condition  
4 of employment' and therefore a mandatory subject for  
5 bargaining is to balance the element of educational  
6 policy involved against the effect the subject has  
7 on a teacher's employment." Id 548 P.2d 285.

8 In applying that test to the three subjects in question I  
9 determine as follows:

10 Teacher Evaluation. This Board in ULP #15, 1975, Billings  
11 Education Association v. School District #2, held that teacher  
12 evaluation is a mandatory subject of bargaining. We are not  
13 persuaded by Respondent's argument that we should change that  
14 ruling. Teacher evaluations affects the very security of a  
15 teacher's position. It affects his tenure, hiring, firing, and  
16 future promotions. It is essential, therefore, to the well being  
17 of the individual teacher that the matter be a subject of negotia-  
18 tions. In order for this Board to promote public business by re-  
19 moving certain recognized sources of strife and unrest, it is  
20 essential that we allow the teacher input on this very important  
21 subject at the bargaining table. This Board's decision in ULP #16  
22 is currently under judicial review. If this Board's decision is  
23 ultimately overturned, an order amending this order will be issued  
24 in accordance with that decision.

25 Housing and Utilities. This hearing examiner has determined in  
26 his findings of fact that there is no official or unofficial  
27 school policy requiring teachers to live in school district housing.  
28 Nor did he find any pressure to be exerted on the teacher to live  
29 there. Because it is not mandatory that teachers live in this housing  
30 we do not find housing and utilities to be related to the individual  
31 well being of the teacher. True, as the housing costs and utilities  
32 go up, the teachers feel it in their paycheck. But that is true of  
all persons who rent.

1 This hearing examiner finds, however, that there is nothing  
2 that makes the subject an illegal subject of bargaining. There-  
3 fore we find it to be a permissive subject of bargaining.

4 School Hours. This hearing examiner does not conclude that  
5 the hour of beginning school closely affects the well being of  
6 the individual teacher. Whether or not school starts at 7:00,  
7 8:00, or 9:00 really does not significantly affect the individual  
8 teacher. I therefore do not find the time school starts to be  
9 a mandatory subject of bargaining under 59-1603(1). I do not,  
10 however, find that the School District is precluded from  
11 negotiating on the subject by 59-1603(2). I therefore find that  
12 the time school begins is a permissible subject of bargaining.

#### 13 DISCUSSION

14 Again, not to belabor the point, but to point out that this  
15 hearing examiner considered the issue of Indian education and  
16 the preservation of their cultural integrity, I cannot find that  
17 my determination in this matter in anyway harmed the goal of the  
18 Rocky Boy School District. The matters I determined to be  
19 mandatory subject of bargaining and permissive subjects of bar-  
20 gaining in no way limit the right of the School Board to carry  
21 out their functions in the School District. Their goal should  
22 be the same as ours, to promote public business and provide the  
23 students with the best education possible. If subjects which  
24 affect the well-being of individual teachers are not proper  
25 subjects of collective bargaining then the resultant strife and  
26 unrest will prohibit the school district from attaining its goal.  
27 Rather than viewing collective bargaining as a threat to its  
28 autonomy, I would encourage the School District to view collective  
29 bargaining as a tool which can be used as an aid in its ultimate  
30 goal of providing the best possible education for the students of  
31 its School District and to instill the cultural heritage and pride  
32 in the students.

CONCLUSIONS OF LAW

1. The School District through its harassment of RBEA have failed to bargain in good faith and have therefore committed an unfair labor practice as defined by 59-1605(1)(e).

2. The School District is guilty of an unfair labor practice in its failure to bargain on the subject of teacher evaluations, as it has failed to bargain in good faith, as defined by 59-1605(1)(e).

ORDER

1. The School District shall cease and desist from further demands on RBEA concerning its bylaws, constitution, membership, and attendance of RBEA's members at the meeting of both local and statewide meetings.

2. The School District shall meet with RBEA representatives and bargain on the subject of teacher evaluations.

3. The present chairman of the School District shall send a letter to this hearing examiner stating that the School Board and its administrators fully understand this decision and order and intend to comply with it.

Dated this 14th day of December, 1976.

BOARD OF PERSONNEL APPEALS

BY Jerry L. Painter  
Jerry L. Painter  
Hearing Examiner

CERTIFICATE OF MAILING

\*\*\*\*\*

I, Vonda Brewster, hereby certify and state that I did on the 14th day of December, 1976, mail a copy of the above Findings of Fact, Conclusions of Law, and Recommended Order to the following:

Mr. Ross Cannon  
Attorney  
1721 11th Avenue  
Helena, MT 59601

Ms. Billie Loring  
Hilley & Loring  
1713 Tenth Avenue South  
Great Falls, MT 59405

Vonda Brewster  
Vonda Brewster